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WHAT SHALL THE TRIAL JUDGE TELL THE JURY ABOUT PRESUMPTIONS?

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I have been asked to add a comment upon the subject of presumptions, comprehensively dealt with in a recent article[1] in this review. My discussion will be summary and selective, and will be devoted to certain practical questions suggested by a late decision of the Supreme Court of the United States, and by some recent cases in the Supreme Court of Washington. These questions relate to the manner in which the trial judge shall deal in his instructions with such presumptions as may have arisen from the evidence in the case.

In the first place, may not the manifest dangers and difficulties of charging upon presumptions be entirely avoided by the simple rule—don't? This is an attractive solution and seems to be advocated as a general practice by Chamberlayne,[2] and by more modern opinions.[3] Thus, Judge Learned Hand recently said: "If the trial is properly conducted, the presumption will not be mentioned at all."[4] And Mr. Justice Butler doubtless meant the same thing when, in the late case referred to,[5] he said: "The case stood for decision by the jury unaffected by the rule" of presumption in the particular case. Nevertheless, I believe that this practice of keeping silent about the relevant presumptions in a case, where the issues are disputed and must be submitted to the jury, runs counter to the traditions of the trial courts in most states.

It is easy to see how the habit of informing the jury of the presumptions has arisen and continued. Trial judges have to deal with controversies and with offers of proof which recur in rather stereotyped forms. The sufficiency of a particular line of proof

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[1]E. M. Morgan, *Presumptions*, 12 WASH. L. REV. 255 (Nov., 1937).

[2]3 MODERN LAW OF EVIDENCE, v. 2, § 1085 (1911).

[3]See, *e. g.*, Cleveland, C., C. and St. L. R. Co. v. Wise, 186 Ind. 316, 116 N. E. 299 (1917); McCune v. Daniels, 251 S. W. 458, 461 (Mo. App., 1923); 64 C. J. 604, n. 45.

[4]Alpine Forwarding Co. v. Pennsylvania R. Co., 60 F. (2d) 734, 736 (1932).

[5]New York Life Insurance Co. v. Gamer, 58 S. Ct. Adv. Sheets 500, 503 (Feb. 14, 1938).

to go to the jury as circumstantial evidence of a certain fact and the consequent propriety of explaining to the jury its bearing and relevancy—this before the trial judge's powers of comment were curbed—would repeatedly be presented. The recognition of the reasonableness of the inference crystallizes into a judicial habit, and the inference hardens into a "presumption". In most judicial writing, the term "presumption" is applied when a recognized effect is required to be attached to a recurring group of facts, whether the judge is merely required to rule that the facts are *sufficient* to be submitted to the jury as leading to a particular inference, or is required to direct the jury that they are *compulsive, i. e.,* that if they believe the facts proven, they must find the fact-to-be-inferred. The one standardized practice is just as much a rule of law as the other.

In the former group, which I have termed permissive presumptions,[6] would probably most often be classed the *res ipsa loquitur* rule,[7] the presumption of theft from possession of the stolen goods,[8] and the great number of instances where statutes make certain proof "*prima facie* evidence" of a particular fact. I have called the other class mandatory presumptions. Probably the presumption of death from proof of seven years' disappearance without being heard from, and the presumption of receipt of a letter duly addressed and mailed would fall in this group. I say "probably", for the necessity for making the distinction seldom arises in practice. The crucial ruling is that the proof is *sufficient* to go to the jury, and it rarely becomes important to know whether the facts if unopposed would require a directed verdict for the proponent, for the adversary is seldom without an answering shot in his locker. If he gives evidence of rebutting circumstances making against the inference, the compulsive effect, of course, is gone. If he answers only with testimony contradicting the existence of the foundation facts, then the trial judge would be required to instruct the jury that if they find these facts, then they *must* find the facts-to-be-inferred.[9] This, again, is rare, so that the compulsive effect is almost never called into play.

Nevertheless, the last-mentioned possibility does show that a broadside rule against charging upon presumptions at all is not

[6]*Charges on Presumptions and the Burden of Proof*, 5 N. C. L. REV. 291 (1927).

[7]Note, *Res Ipsa Loquitur as a Presumption or a Mere Permissible Inference*, 53 A. L. R. 1494.

[8]See Johnson v. State, 190 Ark. 979, 82 S. W. (2d) 521 (1935); DECENNIAL DIGESTS, title *Larceny*, § 77.

[9]Thus the presumption may operate to change the issue from that made by the pleadings, and to that extent may be regarded as having a "substantive" effect. W. W. Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L. J. 333, 354 (1933).

feasible. Moreover, it seems that as to some presumptions, the custom of informing the jury in some fashion of the rule of presumption, is well-nigh universal. *Res ipsa loquitur*,[10] and the presumption of receipt of a letter from due mailing are instances. In criminal cases, this is especially true of those presumptions which look to a general rather than to a specific inference, and might be called "hortatory" presumptions, such as the presumption of innocence, the presumption that one intended the consequences of his acts, and the presumption against one who suppresses evidence, that it would have made against him.[11] The form books are replete with instructions on presumptions,[12] and the digests give abundant evidence of the widespread and unquestioning acceptance of the practice of informing the jury of the presumption despite the fact that countervailing circumstantial evidence has been adduced upon the disputed inference.[13] In Washington, the custom seems to be followed by the trial courts and sanctioned in the court of last resort.[14]

It seems to me that the practice is wise and indeed almost necessary.[15] In most of our states, the trial judge has lost his common law power of summing up the testimony orally and informally in language the jury can understand, and advising them as to the way of judging the credibility of conflicting witnesses and the persuasiveness of rival inferences from the facts. Instead, he must often, as in Washington,[16] give his charge in writing, and as a practical matter he must use abstract language, preferably culled from appellate opinions in past cases, so as to avoid the

[10]It is held in a leading case that in a *res ipsa loquitur* situation a mere general submission to the jury of the issue of negligence, placing the usual burden of proof on the plaintiff, is insufficient. The plaintiff is entitled to instructions which "present the rule in respect to the *prima facie* case." Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 444 (1891). The practice of instructing upon the *res ipsa loquitur* rule is reflected in the cases cited in Note, 53 A. L. R. 1494, DECENNIAL DIGESTS, title *Negligence*, § 138 (2).

[11]For numerous instances of the giving of instructions upon these and other presumptions in criminal cases, see DECENNIAL DIGESTS, title *Criminal Laws*, § 778.

[12]See for example, the title *Presumptions* in the indexes of RANDALL, INSTRUCTIONS TO JURIES (1922); BRICKWOOD'S SACKETT ON INSTRUCTIONS TO JURIES (3d ed., 1908).

[13]DECENNIAL DIGESTS, title *Trial*, §§ 205, 234 (7).

[14]Thus in Goodwin Co. v. Schwaegler, 147 Wash. 547, 549, 266 Pac. 177 (1927) the judgment was reversed for a refusal to instruct on the presumption of receipt of a letter from due mailing. Instructions on presumptions were approved in Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P. (2d) 39 (1933) and in Luna v. Seattle Times Co., 186 Wash. 618, 59 P. (2d) 753 (1936).

[15]I have given my views in the article cited n. 6, *supra*. Illuminating discussions of the question and collections of pertinent cases appear in E. M. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933) and the scholarly opinion of Blume, J. in Worth v. Worth, 48 Wyo. 441, 49 P. (2d) 649, 103 A. L. R. 107 (1935).

[16]REM. REV. STAT., § 339.

danger that, in fitting the instructions to the particular case, he may be held to have violated the prohibition against commenting on the evidence.[17] Instructions upon presumptions, whether permissive or mandatory, since they announce judicial custom crystallized into rules, escape the imputation of being the judge's individual opinion or comment.

They can give the jury substantial aid in avoiding mistakes in difficult cases. A presumption is a rule which has the effect that from certain circumstances a certain inference may be drawn. Persons unaccustomed to weighing evidence and particularly persons of limited intelligence are notoriously suspicious of circumstantial inferences. Such persons, on the other hand, are prone to be over-credulous of direct testimony. If a party having the burden of persuasion, then, must rest upon circumstantial evidence to prove an issuable fact, there is danger that the jury reading the burden-of-proof charge will mistakenly suppose that the circumstantial inference, especially if countered by direct testimony, could not be "a preponderance of the evidence." If the counsel can find a presumption upon which to rely, and can secure a charge upon it, he can use it in his argument as a basis for an explanation which may prevent the case from being decided upon this mistaken notion. Such an argument will be especially effective in states which, like Washington,[18] require the judge to give his instructions to the jury before the argument.

The needs and demands for instructions which will inform the jury of a presumption arising on the facts, though the presumption be faced by circumstantial evidence supporting a contrary inference, are strong enough to guarantee the continuance of the practice in most states, as long as juries continue to sit and judges continue to instruct them. We must face, then, a second and more difficult question: What is to be the form and purport of such an instruction? What shall the jury be told about the presumption, and their use of it? I assume that some standard approach, good for all presumptions except for occasional deviation, should be sought. To attempt to handle them differently, according to a classification based upon their varying origins in trial convenience, in experimental probability, in superiority of access of one party to proof of the fact, or in external considerations of policy, seems impractical. The ingredients are too mixed for the trial judge to detect by offhand taste the predominant flavor, or to admit of agreement to any useful extent, upon a predetermined grouping founded on this scheme on analysis.[19]

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[17]CONST. WASH., Art. IV, § 16.
[18]See statute cited n. 16, *supra*.
[19]Interesting attempts to classify particular presumptions according

The baffling nature of the presumption as a tool for the art of thinking bewilders one who searches for a form of phrasing with which to present the notion to a jury. In a matter where intuition and conjecture play so large a part, it is dangerous to be dogmatic, but certain formulas seem likely to be of little use to the jury. For example, judges have occasionally contented themselves with a statement in the instructions of the terms of the presumption, without more. This leaves the jury in the air, or implies too much.[20] The jury, unless a further explanation is made, may suppose that the presumption is a conclusive one, especially if the judge uses the expression, "the law presumes." Another solution, formerly more popular than now, is to instruct the jury that the presumption is "evidence", to be weighed and considered with the testimony in the case.[21] This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence. More attractive theoretically, is the suggestion that the judge instruct the jury that the presumption is to stand accepted, unless they find that the facts upon which the presumed inference rests are met by evidence of equal weight, or in other words, unless the contrary evidence leaves their minds in equipoise, in which event they should decide against the party having the burden of persuasion upon the issue.[22] It is hard to phrase such an instruction without conveying the impression that the presumption itself is "evidence" which must be "met" or "balanced,"[23] The over-riding objection, however, in my mind is the impression of futility that it conveys. It prescribes a difficult metaphysical task for the jury, which they would only attempt to perform if they were hesitant and doubtful as to how to proceed, and having performed it, if the doubt remains, the reward is the

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to their origins in policy, experience and convenience may be found in the opinions of Maltbie, C. J., in O'Dea v. Amadeo, 118 Conn. 58, 170 Atl. 486 (1934) and Maxey, J., in Watkins v. Prudential Insurance Co., 315 Pa. 497, 173 Atl. 644 (1934).

[20]See the criticism of such a charge in Garrettson v. Pegg, 64 Ill. 111 (1872). But an instruction merely directing the jury to consider the presumption against suicide without explaining its effect was thought sufficient in Radius v. Travelers Ins. Co., 87 F. (2d) 412 (C. C. A. Cal., 1937).

[21]See Mutual Life Insurance Co. v. Maddox, 221 Ala. 292, 128 So. 383 (1930) (presumption against suicide); Clark v. Delmars, 102 Vt. 147, 151, 146 Atl. 812 (1929); Notes, *Presumptions as Evidence*, 95 A. L. R. 878; *Presumption Against Suicide as Evidence*, 103 A. L. R. 185.

[22]This form of instruction seems to be adopted in Ohio. Klunk v. Hocking Valley R. Co., 74 Oh. St. 125, 77 N. E. 752 (1906); Tresise v. Ashdown, 118 Oh. St. 307, 160 N. E. 898, 58 A. L. R. 1476 (1928).

[23]Such an instruction was disapproved on this ground in Bollenbach v. Blumenthal, 341 Ill. 539, 173 N. E. 670, 673 (1930).

instruction to disregard the presumption. It seems to me that it is more calculated to mystify than to help the average jury.

There are some forms of instruction that might give genuine aid toward an intelligent consideration of the issue. Usually, where a presumption is faced with adverse circumstantial evidence, if there is an issue to go to the jury at all, it is because the facts on which the presumption rests create a general probability that the presumed fact exists. The judge might mention these foundation facts, and point out the general probability of the circumstantial inference, as one of the factors to be considered by the jury. Thus, in a recent Federal case, in disapproving a charge on the presumption against suicide, the court said: "Ordinarily, it is not necessary to refer to the presumption against suicide in the charge to the jury. If the basic fact of death by violence is admitted, or proved, the presumption arises, and in the absence of countervailing evidence, the judge should direct a verdict for the plaintiff. If such evidence is produced, the judge should charge the jury in the usual fashion. He may of course refer in his discretion to the improbability of suicide as an inference of fact, based on the common experience of mankind, but the jury should be permitted to give the inference such weight as it deems best, undisturbed by the thought that the inference has some sort of artificial probative force which must influence their deliberation."[24] It will be observed, however, that in the "usual fashion" of instructing a jury in the Federal court, the judge is free to follow the common law tradition of explaining the allowable inferences from the particular circumstantial evidence. As has already been pointed out, however, the trial judges in most states must tread warily to avoid an expression of opinion on the facts. In some of these the practice frowns on any explanation of the allowable circumstantial inferences from particular facts, as being "on the weight of the evidence."[25] Where, however, the judge retains his full common law powers, or short of that, is authorized to explain the allowable inferences, this form of instruction may serve most of the useful purposes of a charge upon the presumption itself.

Most, but perhaps not all. The mind abhors the vacuum of uncertainty. The trial must end in a verdict, a truth-saying. But there are many controversies where certainty about the truth is really impossible. An airplane falls from the sky, a locomotive crashes into an automobile at midnight, a trawler sinks without a

[24]Soper, Circ. J., in Jefferson Standard Life Insurance Co. v. Clemmer, 79 F. (2d) 724, 103 A. L. R. 171, 180 (C. C. A., Va., 1935).

[25]Pridmore v. Chicago, R. I. & P. R. Co., 275 Ill. 386, 114 N. E. 176 syl. 6 (1916); Kennedy v. Phillips, 319 Mo. 573, 5 S. W. (2d) 33 syl. 7 (1928); 64 C. J. 527, n. 4.

trace. Liability hinges upon "fault." There are no survivors who witnessed the crucial happenings preceding the disaster. Still the jury must reach, if possible, a "finding" upon the "facts." The principal agency which is provided to enable them to simulate certainty is the notion of burden of proof in the sense of burden of persuasion. The judge is to instruct them that if they are uncertain upon an issue, they nevertheless shall make a "finding of the facts" against the party having this burden. This unlucky burden is fixed largely with reference to the rules regulating the duty of pleading. But the principal object of pleading is the conveying of fair notice to an adversary of the scope of one's claim. This secondary effect of apportioning the risk of uncertainty, when tied strictly to the regulation of pleading, seems to lead occasionally to unsatisfying results. The general effect of the pleading rules is to place most of the burden upon the plaintiff, and as to certain particular groups of facts the result of this allotment of the burden of persuasion is felt to be harsh and inexpedient.

Many courts have found escape by the use of presumptions. The presumption has a closer kinship with the burden of persuasion than the rules of pleading have. The burden of persuasion is a fiction by which a feeling of uncertainty may be converted into a finding of facts. The presumption, as an instrument of reasoning, is but a mild and ingratiating form of the same fiction.[26] The mind when beset with difficulties does not steam continuously straight ahead to its goal. It tacks across from point to point. Or like a swimmer making his way toward a safe and distant shore, it seeks a reef on which to rest until it may be shown that it can move on with safety. So in reasoning toward a difficult decision we are prone to look for some rational hypothesis, some "working assumption"[27] on which we can stand until lured away by the attraction of a more inviting theory or conclusion. The hypothesis is not a goal, but a station on the journey. Consequently, the mere mention of the presumption to the jury, or the instruction as to the allowable circumstantial inference, without more, leaves us with an unsatisfied feeling, with a fear that the jury may wish to know, Where do we go from there?

Accordingly, the custom has persisted in many states, with surprisingly tough resistance to the criticisms of the text-writers, of charging the jury as to certain presumptions having a substantial backing of probability, that the presumption stands until overcome in the jury's mind by a preponderance of evidence to the

[26]For an enlightening discussion of the fictional element in presumptions, see L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 393 (1930).

[27]Del Vecchio v. Bowers, 296 U. S. 280, 286 (1935).

contrary.[28] In other words, the presumption is a "working" hypothesis which works by shifting the burden to the party against whom it operates of satisfying the jury that the presumed inference is untrue. This often gives a more satisfactory apportionment of the burden of persuasion on a particular issue than can be given by the general rule that the pleader has the burden. One looks rather to the ultimate goal, the case or defense as a whole, the other to a particular fact-problem within the case. Moreover, an instruction that the presumption stands until the jury are persuaded to the contrary, has the advantage that it seems to make sense, and so far as we may judge by the other forms thus far invented of instructions on presumptions by that name, I think we can say that it is almost the only one that does.

A Washington case at the turn of the century approved in a suit by a shipper for goods destroyed by the collapse of the steamship company's wharf, an instruction that under these facts a presumption of negligence arose, and that the burden was cast on the defendant of removing the presumption by a preponderance of evidence.[29] A dozen years later in the course of a long and somewhat confused discussion, in a picturesque death-action involving not a presumption but a question of the burden of proof of self-defense, the court said: "A presumption simply changes the order of proof to the extent that one upon whom it bears must meet or explain it away. When such explanation is made, the duty is upon a plaintiff to take up the burden which the law has cast upon him and sustain the issue by a preponderance of the evidence."[30] The recent case of *Steiner v. The Royal Blue Cab Company*[31] squarely presented the question. The trial judge instructed "that a presumption of operation by the owner arises when the ownership of an automobile in a collision is admitted or proven, and that the burden is then cast upon the defendant to overcome such presumption by a fair preponderance of all the evidence." The giving of this charge was assigned as error, and the Supreme Court specifically approved it, and relied on the early case of the steamship wharf. While the opinion does not always distinguish clearly the two burdens of going forward with evidence and of persuading

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[28]See Morgan, *Presumptions*, 12 WASH. L. REV. 255, 265 (1937); Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920). A recent English case approving this practice is Winnipeg Electric Co. v. Geel [1932] A. C. 690 (Privy Council).

[29]Foster v. Pacific Clipper Line, 30 Wash. 515, 71 Pac. 48 (1902). The opinion can be interpreted, however, as a mere recognition that the defendant having pleaded accident as an affirmative defense assumed the burden of persuasion.

[30]Welch v. Creech, 88 Wash. 429, 153 Pac. 355, L. R. A. 1918 A 353 (1915).

[31]172 Wash. 396, 20 P. (2d) 39 (1933).

the jury, in upshot it seems a clear sanctioning of the instruction which gives to the presumption the effect of shifting the latter burden.

A recent pronouncement by the Supreme Court of the United States, in the case of *New York Life Insurance Company v. Gamer*[32] definitely disapproves this practice and restates the position of Thayer and Wigmore that the presumption "ceases upon the introduction of substantial proof to the contrary." The action was upon a life policy, with provision for double indemnity for accidental death, containing the clause, "double indemnity shall not be payable if the insured's death resulted from self-destruction." The complaint charged accidental death and that death did not result from suicide. The answer denied accident, and "as an affirmative defense" alleged suicide. The insured died from a pistol shot through the heart and the circumstances proved were such that the jury might reasonably have found for or against suicide. The trial judge, relying upon an earlier pronouncement of the Supreme Court approving a similar charge on the same issue, instructed: "The presumption of law is that the death was not voluntary, and the defendant . . . must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary." Verdict and judgment followed for the plaintiff. The Supreme Court, speaking through Mr. Justice Butler, distinguished the earlier decision on somewhat tenuous grounds, and reversed the judgment for error in this instruction. The opinion is quite unsatisfying in its failure to deal with the body of recent scholarly opinion[33] which supports the practice followed by the trial court.[34] The Washington court handles the problem of burden of persuasion in this type of cases by a different method, which might well have been open to the court in the Federal case. It holds that where the policy excepts suicide from the risk assumed, the defendant must plead suicide as an affirmative

[32]58 S. Ct. Adv. Sheets 500 (1938).

[33]Particularly the articles by Morgan, cited n. 28, *supra*, and Bohlen, n. 28, *supra*. Other recent opinions on the same question, which reach the same conclusion as the Gamer case, but which treat the problem far more adequately, are the Watkins case, *supra*, n. 19, and the Clemmer case, *supra*, n. 24.

[34]Nor does Mr. Justice Black's dissent give any adequate discussion of the merits of the question whether the jury should be instructed that the burden shifts. He does raise the interesting question, ignored by the majority, whether the Federal court in Montana was required to follow the Montana rule as to this. His further objection, that the majority opinion trenches upon jury functions in conceding to the trial judge the power to determine, after the presumption against suicide has been answered by evidence, whether there is substantial conflict to be submitted to the jury, seems baseless. This is one of the familiar common law powers of the judge.

defense, and consequently carries the burden of persuasion as upon other such defences.[35]

Professor Morgan argues persuasively for endowing the presumption with the effect of shifting the burden of persuasion, but suggests that this may best be done by the charge on the burden of proof, without mentioning the presumption to the jury at all.[36] As I have indicated earlier in this paper, I am inclined to think that it is a more natural practice, especially under the American tied-judge system, to mention the presumption, so that the jury may appreciate the legal recognition of a slant of policy or probability as the reason for placing on the party this particular burden. If this is true when the presumption operates (as it usually would) in favor of the plaintiff, who has the general burden of proof, so that the presumption would result in an issue being singled out and the burden thereon placed on the defendant, much more is it true (as Mr. Justice Blume points out in the passage quoted by Professor Morgan [36a]) when the presumption operates in favor of the defendant. In such case the presumption would not affect the instructions at all, but would be swallowed up in the larger instruction that the plaintiff has the burden on everything that he has pleaded. This smothers any hint of the recognized policy or probabilities behind the particular presumption.

A final situation brings into sharpest focus the problem of the value of the presumption as a guide for decision by judge or jury. We have said that in cases where the fact at issue is really unascertainable, the presumption serves to translate uncertainty into decision, namely, into the finding favored by policy or *a priori* probability. Let us suppose that a party proves circumstances which ground an inference and a presumption of a fact-in-issue. He proves due mailing of a letter, properly addressed, bearing a return address, and that it was never returned. Not only does this create a technical, legal presumption, conclusive if contrary evidence is not adduced, that the letter was duly delivered to the addressee, but if the evidence is believed, it creates a probability which measured by experience makes the odds overwhelming in favor of due delivery. We may certainly assume that the class of letters, of which all we know is that they have been duly mailed, correctly addressed and not returned, will have been duly delivered in the ratio of one thousand delivered to one miscarried. But

[35]Selover v. Aetna Life Insurance Co., 180 Wash. 236, 38 P. (2d) 1059 (1934) (disapproving instruction placing burden of persuasion upon plaintiff, and holding erroneous also an instruction that the presumption against suicide disappears when any competent evidence to the contrary is adduced).

[36]12 WASH. L. REV. 281.

[36a]12 WASH. L. REV. 273.

suppose this is not all we know. Suppose the addressee takes the stand and testifies unequivocally that he did not receive the letter. Here we have traveled outside the range of familiar current experience. We cannot generalize with confidence upon the odds against miscarriage in the group defined as cases where the sender swears to due mailing and addressing and no return, and the addressee swears to non-delivery. On the one hand, the addressee may be lying or mistaken about delivery. On the other, the sender may be lying or mistaken about the mailing; or the postal service, by remote chance, may have miscarried. The latter possibility still seems a minor factor in the equation. The testimony of the addressee that he did not receive the letter is not disputed, we assume, by any direct testimony of anyone who asserts that he did receive it. Is it for this reason to be accepted as conclusive by all reasonable men, and must the judge accordingly direct the jury to find, contrary to the presumption, that the letter was not received? Despite some early cases when mails were less regular, and others where the balancing factors were not recognized, the answer today is clear. The issue is for the jury.[37] But the need here is most imperative for an instruction upon the presumption, preferably one which explains the presumption, and the probabilities on which it rests, and advises the jury that the addressee's testimony, though not directly contradicted, is not conclusive.

In another situation, now frequently recurrent, the circumstantial inference behind the presumption, and the direct testimony, meet head-on. The plaintiff sues for injury caused by an automobile. To establish the defendant's responsibility, the plaintiff proves that the automobile was owned by the defendant, and that at the time of the injury, it was driven by an employee of the defendant. These facts are usually not controverted. They raise a presumption, and an inference from experience, that at the time of the accident, the car was being used in the course of the owner's business. But the defendant and the driver testify that the driver at the particular moment was using the car against orders and upon a private errand. If there is no direct contradiction, and no evidence of other circumstances bearing on the probable truth of the stories of the owner and driver, should the issue go to the jury? It would seem so. True; the regularity of chauffeurs in sticking to business is much less invariable than the regularity of the mails. The chances of deviation are greater, but even so, the odds are very heavy on regularity. Moreover, the foundation-facts

[37] American Surety Co. v. Blake, 54 Idaho 1, 27 P. (2d) 972, 91 A. L. R. 153, 164 (1933). The earlier Washington cases were to the contrary, but the present holding is in accord. Goodwin Co. v. Schwaegler, 147 Wash. 547, 266 Pac. 177 (1928); 91 A. L. R. at 157.

of ownership and employment (unlike the letter-mailing) are easily checked, and usually admitted. In addition, the situation would be pregnant with temptation to safe and successful perjury if there were a rule that the owner's and driver's testimony, though against the grain of experience as evidenced by the presumption, must be believed. Probably no court would assert such a rule. The California statute[38] providing that a jury is not required to believe direct testimony against a legal presumption, may support the opposite rule, that in such cases the jury must always be given the liberty to decide against the testimony and for the presumption. The later Washington cases[39] seem to announce an intermediate rule that the presumption is not "met", "overcome" or "rebutted" by direct testimony denying the presumed fact, where the testimony is from witnesses who are "interested"—and an employee is classed as "interested"[40]—or by evidence which is merely circumstantial.[41]

It seems arguable, however, that the solution should not be sought in terms of a mechanical "rule" about the character of evidence which will "overcome" a presumption. Actually the case seldom stands starkly as one of presumption versus direct testimony. In the presumption from ownership and employment, there are nearly always circumstances such as place and time of accident, persons accompanying the driver, or contents of the vehicle, which will confirm or shake the credibility of the story. Moreover, the statement of a rule naturally leads to its application to other presumptions, where the backing of probability is much slighter,[42] and where the rule is calculated to send cases automatically to a jury where the trial judge's control is needed. With deference it is submitted that all these controversies, with their infinite variety of factors beyond the mere elements of presumption and direct testimony, should be left, as the question of directing a verdict is usually left, for individualized handling by

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[38]CODE CIV. PROC. § 2061, subdivision 2 (Deering's ed., 1937).

[39]Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P. (2d) 39 (1933); McMullen v. Warren Motor Co., 174 Wash. 454, 25 P. (2d) 99 (1933); Templin v. Doan, 187 Wash. 68, 59 P. (2d) 1110 (1936).

[40]Steiner v. Royal Blue Cab Co., n. 39, *supra*. See the criticism of this result, in which it is pointed out that in these cases the defendant's witnesses will practically always be "interested", under this test. Paul M. Goode, *Presumptions Arising from Ownership of a Vehicle*, 8 WASH. L. REV. 137, 139 (1934). It has been suggested that the emphasis upon interest here is a relic of the common law disqualification of interested persons. Denton v. Carroll, 4 App. D. 532, 40 N. Y. S. 19 (1896).

[41]Reinhart v. Ore.-Wash. R. & N. Co., 174 Wash. 320, 24 P. (2d) 615 (1933).

[42]Thus the problem has arisen, for example, in connection with the following presumptions (in addition to those of receipt from due mailing, and liability from ownership of a vehicle) which I should rank in a

the trial judge in the exercise of his trained and responsible judgment.[43] The problem will then be seen as one of assessing all the evidence and inferences, including the inference behind the presumption, and including the discounting effect of any interest which a witness may have, to determine whether minds could reasonably differ as to the conclusion to be reached.

descending scale as to strength of probabilities. Payment of premium, from delivery of policy to insured. Beggs v. Metropolitan Life Insurance Co., 219 Iowa 24, 257 N. W. 445, 95 A. L. R. 863 (1934) (for jury). Presumption in death-action of due care of deceased. Reinhart v. Ore.-Wash. R. & N. Co., n. 41, *supra* (for jury). Presumption of sanity of accused in criminal case, Commonwealth v. Clark, 198 N. E. 641 (Mass., 1935) (for jury). Statutory presumption that statement secured from injured person within thirty days after injury was fraudulently procured. Cosgrove v. McConagle, 196 Minn. 6, 264 N. W. 134 (1935) (presumption created no issue for jury, in face of undisputed contrary credible evidence). Presumption that plaintiff in libel suit bore good reputation. Luna v. Seattle Times Co., 186 Wash. 618, 59 P. (2d) 753, 105 A. L. R. 932 (1936) (for jury).

[43]Convincing expositions of this view are found in the opinions of Campbell, J., in Jelke v. Delmont State Bank, 54 S. D. 446, 223 N. W. 585, 72 A. L. R. 7 (1929); and Belt, J., in Miller v. Service and Sales, Inc., 149 Ore. 11, 38 P. (2d) 995 (1934). See Notes, *Right to Direct a Verdict on Testimony of Interested Witness*, 72 A. L. R. 27; *Conclusiveness of Uncontradicted Testimony of Interested Witness Where Opposed to Presumption*, 72 A. L. R. 94.